

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, :
 :
 Plaintiff, :
 :
 v. : Criminal Action No. 99-7-JJF
 :
 WILLIAM FRAZIER, :
 :
 Defendant. :

MEMORANDUM ORDER

Pending before the Court is a letter motion (D.I. 124) filed by Defendant William Frazier, requesting an extension of time to file an appeal from the Court's November 20, 2009 Order (D.I. 113) denying Defendant's Motion Under Fed. R. Civ. P. 60(b)(3) (D.I. 103), which alleged fraud upon the Court.

I. BACKGROUND AND PARTIES' CONTENTIONS

In July 1999, Defendant was tried before a jury and convicted of one count of Distribution of Cocaine Base in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B) ("Count One") and one count of Distribution of Cocaine Base in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A) ("Count Two"). At sentencing, the Government established that Defendant had two prior felony convictions. As a result, the Court sentenced Defendant to a mandatory term of life imprisonment on Count Two and a consecutive life sentence on Count One. Defendant appealed his conviction and sentence, and the Third Circuit affirmed. (D.I. 64.)

In February 2001, Defendant filed a Section 2255 Motion, which was amended in February 2003. The Court denied Defendant's amended Section 2255 Motion (D.I. 95, 96), and declined to issue a certificate of appealability. Defendant requested a certificate of appealability from the Third Circuit, and the Third Circuit denied Defendant's request. (D.I. 100.)

On August 27, 2007, Defendant filed a Motion under Fed. R. Civ. P. 60(b)(3), alleging that the Magistrate Judge and the federal prosecutors perpetrated a fraud upon the Court by failing to accurately advise Defendant at his arraignment of the penalties he faced if he was convicted. (D.I. 103.) On November 20, 2009, the Court denied Defendant's Motion, concluding that the Motion was untimely, and, in the alternative, that the Court lacked jurisdiction over the Motion because it constituted a second, successive Section 2255 Motion. (D.I. 112, 113.) The Court also declined to issue a certificate of appealability. (D.I. 113.)

On June 10, 2010, Defendant filed the pending letter motion for an extension of time to file an appeal. By his letter motion, Defendant contends that he was not notified of the Court's denial of his Rule 60(b)(3) Motion, and thus, he did not have an opportunity to appeal it. (D.I. 124.) According to Defendant, he first became aware of the Court's denial of his Rule 60(b)(3) Motion on May 25, 2010. (D.I. 122.) As a result

of this delay, Defendant contends that he should be afforded an opportunity to appeal the Court's decision. (D.I. 124.)

In response, the Government has filed an opposition to Defendant's Motion. The Government contends that Defendant's request for extension of time is untimely under Fed. R. App. P. 4(a)(1)(5)(A), and that Defendant has not demonstrated that the time to file an appeal should be reopened under Fed. R. App. P. 4(a)(6).

II. DECISION

When the United States is a party to an action, an appeal of a civil judgment or order must be taken within 60 days after the judgment or order is entered. Fed. R. App. P. 4(a)(1)(B). The Court may extend the time to file an appeal, if a party moves for an extension of time within 30 days after the time for appeal has expired and shows excusable neglect or good cause for the delay. Fed. R. App. P. 4(a)(5)(A). The Court's Order denying Defendant's Rule 60(b)(3) Motion was entered in November 2009, and therefore, the time provided in Fed. R. App. P. 4(a)(5)(A) for seeking an extension of time to appeal has expired.

However, Fed. R. App. P. 4(a)(6) provides an alternative basis for extending the appeal time. Specifically, Fed. R. App. P. 4(a)(6) provides that the Court may reopen the time to file an appeal for a period of 14 days, if the following conditions are satisfied:

(A) the court finds that the moving party did not receive

notice under Federal Rule of Civil Procedure 77(d) of the entry of judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

Fed. R. App. P. 4(a)(6).

Even if the Court accepts Defendant's contention that he did not receive notice of the Court's November 20, 2009 Order until May 25, 2010, the Court concludes that Defendant is not entitled to an extension of time because he cannot satisfy the time limitations set forth in Fed. R. App. P. 4(a)(6). The Court's Order was entered on November 20, 2009, and 180 days from that date is May 19, 2010. Defendant further states that he received notice of the Court's Order on May 25, 2010, and 14 days from that date is June 8, 2010. Pursuant to Fed. R. App. P. 4(a)(6), the Court is required to consider the earlier of these two dates, and therefore, Defendant must have filed his request to reopen the time for filing his appeal by May 19, 2010.

Defendant filed the instant letter motion on June 10, 2010, which is after the May 19, 2010 deadline. Accordingly, the Court concludes that Defendant's letter motion requesting an extension of time to appeal, or alternatively, to reopen the time for filing an appeal, is untimely.

A certificate of appealability is required before a Defendant can appeal the denial of an extension of time under Fed. R. App. P. 4(a)(6). A certificate of appealability is appropriately issued "if the § 2255 movant shows: (1) that jurists of reason would find it debatable whether the district court abused its discretion in denying the Rule 4(a)(6) motion; and (2) that jurists of reason would find the district court's assessment of the constitutional claims in the underlying order debatable or wrong." United States v. Rinaldi, 447 F.3d 192, 195 (3d Cir. 2006). The Court is not persuaded that reasonable jurists would debate its conclusion that the instant request for an extension of time to appeal is untimely, or that the Court's underlying order denying Defendant's Rule 60(b) motion was debatable or wrong. Accordingly, the Court will deny Defendant's letter motion seeking an extension of time to file an appeal.

NOW THEREFORE, IT IS HEREBY ORDERED that:

1. Defendant William Frazier's letter motion requesting an extension of time to file an appeal (D.I. 124) is **DENIED**.

2. To the extent the Court must consider whether to grant a certificate of appealability, a certificate of appealability is **DENIED**.

July 14, 2010
DATE


UNITED STATES DISTRICT JUDGE